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In the
# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1498

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, and DISTRICT 147 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

PETITIONERS,

*v.*

NORTHEAST AIRLINES, INC.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITIONERS,

*v.*

NORTHEAST AIRLINES, INC.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in this case.

### Opinions Below

The opinion of the Court of Appeals is set forth in Appendix A (infra, pp. 9-27) and is reported at — F 2nd —. The opinion of the District Court is set out in Appendix C (infra, pp. 29-42) and is reported at 337 F. Supp. 499.

## Jurisdiction

The judgment of the Court of Appeals was entered on April 20, 1972 (see Appendix B, infra, p. 28). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## Question Presented

Whether section 2 First of the Railway Labor Act, 45 U.S.C. 152, imposes upon an air carrier a duty to bargain with a union representing its employees about (a) whether it will merge with another air carrier, and/or (b) the effects upon its employees of any such merger.

## Statute Involved

The statutory provision principally involved is Section 2 First of the Railway Labor Act. Section 2 First, 45 U.S.C. 152 First, provides as follows:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreement or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

## Statement

The International Association of Machinists and Aerospace Workers and its District 147 (hereinafter referred to as "union") and Northeast Airlines, Inc. (hereinafter

referred to as "company") have entered into two collective bargaining agreements. (A 13, 20)[1] The first covers employees in the mechanics crafts[2]; the second covers supervisory employees.[3]

The company is a Massachusetts corporation and an "air carrier" within the meaning of the Railway Labor Act. (A 2-3) On May 12, 1971 the company entered into a formal merger agreement with Delta Air Lines, Inc. (A 58) That agreement provides, *inter alia*, that the separate corporate existence of Northeast will cease upon consummation of the merger and that Delta Air Lines, Inc. will continue as the surviving corporation.[4] (A 58-59)

The company entered into its merger agreement with Delta Air Lines, Inc.[5] without any discussion or negotiation with the union. The merger agreement contains a short paragraph entitled "Labor Protective Conditions"[6] (A 59). That paragraph makes no definite provisions for the seniority and other rights of Northeast employees represented by the Petitioner.

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[1] "A" refers to the Joint Appendix before the Court of Appeals, a copy of which has been filed with the Clerk.

[2] This agreement is dated April 18, 1969; it expired on December 31, 1971 but its terms continue in effect under the provisions of Section 6 of the Railway Labor Act, 45 USC 156.

[3] This agreement is dated November 6, 1969 and remains in effect by its terms until at least June 1, 1972. Both of these agreements contain the following provision in their respective Articles 3(B):

> "(B) It is further understood and agreed that all provisions of this Agreement shall be binding upon the successors or assigns of the Company for the duration of this Agreement. In case of a consolidation or merger, representatives of the Company and Union will meet without delay and negotiate for proper provisions for the protection of employees' seniority and other rights." (A 13 & 20)

[4] The merger must be approved by the Civil Aeronautics Board before it can be consummated. A CAB Examiner has recommended approval but the Board has yet to act on his recommendation. Under the terms of the Merger Agreement, CAB approval must come no later than June 30, 1972. If it does not come by that date, the merger agreement expires by its own terms. (A 81)

[5] Hereinafter referred to as "Delta".

[6] Paragraph 5 of the Merger Agreement.

The union demanded that the company meet and negotiate about proper provisions for the protection of the seniority and other rights of its member-employees; the union wanted the agreement reached in any such negotiations to be incorporated into any merger agreement between the company and Delta. The company refused to negotiate about this matter (A 33-34).[7]

Because of the company's refusal to negotiate about proper provisions for the protection of the seniority and other rights of its IAM member employees, the union turned to the courts for relief. On January 24, 1972, the union brought an action in the United States District Court, District of Massachusetts, to compel the company to bargain in good faith about the proper provisions for seniority or other rights of IAM member employees. The union requested that the merger between the company and Delta be enjoined until such good faith bargaining took place. The case was heard on the union's motion for a preliminary injunction; the District Court denied the injunction on February 3, 1972.[8] The union immediately appealed from the denial of a preliminary injunction. The Court of Appeals affirmed the decision of the District Court[9] on April 20, 1972.

## Reasons for Granting the Writ

The question of whether an air carrier is required by the Railway Labor Act[10] to negotiate with a union representing its employees about (a) whether it will merge with another

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[7] The first demand to negotiate about this matter was made on November 11, 1971, the first day of negotiations for a new agreement covering mechanics. A subsequent demand was made on November 22, 1971; it too was refused (A 34).

[8] See Appendix C, infra, pp. 29-42.

[9] See Appendix A, infra, pp. 9-27.

[10] Hereinafter referred to as "the Act".

air carrier and/or (b) the effects upon its employees of any such merger is an important one. The holding of the Court of Appeals that an air carrier need not negotiate about either of these matters seriously narrows the protections afforded by Section 2 First of the Act.

1. Section 2 First requires all carriers "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes."[11] This section of the Act is enforceable by the courts.[12] *Chicago & North Western Ry.* v. *United Transportation Union,* 402 U.S. 370, 77 LRRM 2337.

The Company has taken the position that Section 2 First of the Act imposes no duty upon it to bargain about whether it will merge and/or the effects upon its employees of any such merger. The District Court and the Court of Appeals have sustained that position; the union asks this Court to overrule it.

2. To be sure, the decision to merge is a managerial one. So is the decision to subcontract all or part of the work of a business. The latter decision (and not just its effects) was held to be a mandatory subject of collective bargaining by this Court in *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964). The National Labor Relations Board has held that certain managerial decisions (and not just the effects of those decisions) are mandatory subjects of collective bargaining, i.e. selling part of a business. *Star Baby Company,* 140 NLRB 678 (1963) enforced as modified sub nom. *NLRB* v. *Neiderman,* 334 F.2nd 601 (2 Cir. 1964); relocating a business, *R. C. Can Company,* 144 NLRB 210 (1963); transferring work from one plant to another, *Shell Oil Co.,* 149 NLRB No. 26, *Ozark Trailers, Inc.,* 161 NLRB 561 (1966).

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[11] 45 U.S.C. 152 First.

[12] The Court of Appeals so held in this case despite the company's argument to the contrary.

The Court of Appeals distinguished the decision to merge from these other managerial decisions by calling it "much nearer the core of entrepreneurial control."[13] What that Court failed to take into account was that the merger itself would profoundly affect the working conditions of the employees involved in this case; it would almost certainly affect the rates of pay and rules under which such employees would be working.[14]

It must be emphasized that all the union is asking in this case is that the company bargain in good faith; an employer's obligation to bargain does not include an obligation to agree to the union's demands.

Although the obligation to bargain in this situation might reduce an employer's flexibility, the statute mandates that such bargaining take place. "Rates of pay, rules and working conditions" are mandatory subjects of collective bargaining pursuant to Section 2 First of the Act. Since the merger has an inevitable effect on those subjects, it must be bargained about upon request of the union.

3. Assuming arguendo that the decision to merge is not a mandatory subject of bargaining under Section 2 First of the Act, surely the effect of that decision is a mandatory subject. Among the principal effects of that decision upon the employees will surely be changes in seniority, employment and other rights. Even the Court of Appeals agrees "that employment security falls within the ambit of 'pay, rules and working conditions'[15]." The Court of Appeals goes on to recognize "the employers have an obligation generally to bargain about seniority, severance pay and other matters relating to employment security."[16] Even where the basic decision to act is not a mandatory subject of collective

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[13] Court of Appeals decision, p. 12, Appendix A, p. 20.

[14] There are approximately 1,000 Northeast employees who are represented by the union. Delta has over 20,000 employees; only Delta's pilots are represented by a union.

[15] Court of Appeals decision, p. 13; see Appendix A, p. 21.

[16] Court of Appeals decision, p. 13; see Appendix A, p. 21.

bargaining, there is a long line of cases that hold that the *effects* of that decision are mandatory subjects of collective bargaining. See, for instance, *NLRB* v. *Transmarine Navigation Corp.*, 380 F. 2nd 933 (9 Cir. 1967), *NLRB* v. *Royal Plating and Polishing Company*, 350 F. 2nd 191 (3 Cir. 1965), *NLRB* v. *Drapery Manufacturing Company*, 425 F. 2nd 1026 (8 Cir. 1969), *Morrison Cafeterias Consol., Inc.* v. *NLRB*, 431 F. 2nd 254 (8 Cir. 1970). These National Labor Relations Act decisions apply by analogy to the Railway Labor Act.[17]

The Court of Appeals decision in this case conflicts with all the above-mentioned cases. It is in direct conflict with the principle that underlies all these decisions, namely, that the effects of economically motivated managerial decisions (if not the decisions themselves) are terms and conditions of employment.[18]

The Court of Appeals seeks to distinguish the effects of a merger from the effects of other types of management decisions.

> "While a merger, too, affects employment security, it does so in a manner somewhat different from that of these other shifts in the corporate enterprise. A merger, unlike a decision to relocate, to shut down a plant, or to terminate operations altogether, does not immediately and directly eliminate jobs. What it does, instead, is substitute a new employer who may not be bound by all the terms of the present collective bargaining agreement, and who may make further management decisions, such as integrating the oper-

[17] The Fourth Circuit stated in *Norfolk & P.B.L.R. Ry.* v. *Brotherhood of Railroad Trainmen*, 248 F. 2nd 34, "... the negotiations required by the Railway Labor Act is the same good faith bargaining required by the Labor-Management Relations Act." 248 F 2nd 34, 45, n. 6.

[18] In the case of the Railway Labor Act, "rules and working conditions".

ations of the two companies, which will eliminate jobs. A merger is different also, in the nature of the decision itself. The other entrepreneurial changes we have discussed are characteristically unilateral, and affect only one firm. A merger, on the other hand, is the result of the decisions of two or more companies, depends on negotiations between the corporations involved, and affects the employees and the business of all the firms joined."[19]

Assuming arguendo that these distinctions are valid, they still have no effect on the company's duty to bargain. Once it is admitted, as the Court of Appeals admits in its decision,[20] that a merger affects employment security, then the Act requires pre-merger bargaining about its effects upon such security.

## Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[19] Court of Appeals decision, p. 14; Appendix A, pp. 22-23.
[20] Court of Appeals decision, p. 14; Appendix A, p. 21.

APPENDIX A

# United States Court of Appeals
## For the First Circuit

No. 72-1038

INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS
and
DISTRICT 147 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS,
PLAINTIFFS, APPELLANTS,

*v.*

NORTHEAST AIRLINES, INC.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

*Robert M. Segal* and *Plato Papps*, with whom *Segal, Roitman & Coleman* was on brief, for appellants.
*Loyd M. Starrett*, with whom *Henry E. Foley, David B. Ellis*, and *Foley, Hoag & Eliot* were on brief, for appellee.

April 20, 1972

ALDRICH, *Chief Judge*. On May 12 71, Northeast Airlines, Inc. (NE) entered into a previ and agreement to merge into Delta Air Lines, Inc. (Delta This was the fifth attempt by NE to merge with another li Whatever may have motivated the others, all of which fa for one reason

or another, NE's substantial and continuing deficits seem clearly to have impelled this one. Indeed, it asserts without contradiction that this is its last chance for survival.[1] The agreement has not yet become final. Either party may terminate unless both CAB and stockholder approval is secured prior to the designated consummation date of June 30, 1972. Permission was sought of the CAB by filing on May 12, 1971. Following pre-trial procedures, a trial examiner conducted hearings in July, and on October 26 rendered a report to the Board recommending approval. The Board, as yet, has made no decision. The NE stockholders voted to approve on January 31, 1972. It does not appear from the record whether the Delta shareholders have yet done so.

NE has collective bargaining agreements, one with its mechanics, which expired December 31, 1971 subject to being continued in force by virtue of section 6 of the Railway Labor Act, 45 U.S.C. § 156, and one with its supervisors, which will expire on June 1, 1972. In both instances the union involved is the International Ass'n of Machinists and Aerospace Workers and its District 147, plaintiffs appellants, hereinafter, collectively, the Union. Both of these agreements and their predecessors going back to 1949, have contained what is now Article 3(B), as follows.

> "It is further understood and agreed that all provisions of this Agreement shall be binding upon the successors or assigns of the Company for the duration of this Agreement. In case of a consolidation or merger, representatives of the Company and Union will meet without delay and negotiate for proper provisions for

[1] To document its plight, NE presented testimony that it had suffered losses in 1969 of $28,843,000, and in 1970 of $10,721,000, and that as of May 31, 1971, it had a negative net worth of $36,616,000. NE further avers that it anticipates continuing substantial losses in 1971 and 1972, and that Storer Broadcasting Company, which has been its major source of financial support, has resolved to provide no further cash advances beyond what is necessary to prosecute the NE-Delta merger.

the protection of employee's seniority and other rights."

No question has hitherto arisen under this clause, although one previous merger progressed even further than the present one before it aborted.

Since the agreement provided for automatic renewal and no change in the contract terms could be made without notice served on or before October 31, 1971, NE on October 28 sent the Union an appropriate section 6 notice of intended termination of the Mechanics' agreement, proposing that the agreement be extended only for "a few months." On October 31 the Union sent its own notice, saying that it wanted the agreement to run a full term, and enclosing a list of further proposals. The enclosure, some six pages long, requested, inter alia, changes in Article 3(B), to provide procedures for premerger negotiations. On November 11, the first meeting resulting from this correspondence, the Union announced that its first request was not for the contract changes it had proposed, but for negotiations for specific postmerger protective provisions, relating to seniority, employment, and other conditions. The company asked time to consider this request. After several further meetings, at which time the position of the parties might be said to have hardened, on December 31, the Union stated that this subject was all it would negotiate, and the company said it was willing to "discuss," and to go to the National Mediation Board or System Board of Adjustment, but that the matter was one which it had no obligation to negotiate.[2] On the basis that the company offered only

[2] Since the Mediation Board does not have exclusive jurisdiction to define the subjects about which an employer has a statutory duty to bargain, *see Pan American World Airways* v. *International Bhd. of Teamsters*, S.D.N.Y., 1967, 275 F.Supp. 986, *aff'd*, 2 Cir., 1969, 404 F.2d 938, we do not see how the company's suggestion to seek its services is pertinent to the case before us, except as revealing a willingness to bargain about the other issues initially raised by the union, not presently relevant.

discussion, with no recognition of a duty to bargain, the Union left the meeting, and on January 24 brought the present suit. Jurisdiction derives from the Railway Labor Act, 45 U.S.C. § 151 *et seq.*

The Union seeks to compel the company to negotiate, and to include in the merger agreement whatever should be the product of the negotiations. It requested a preliminary injunction, in alternative terms.[3]

> "(a) Consummating any merger with the Delta Air Lines, Inc. until the Company has negotiated and bargained in good faith with the Plaintiffs about the proper provisions for the seniority, employment and other rights of the employees of Northeast Air Lines Inc. [sic] represented by Plaintiffs."
>
> "(b) In any manner refusing to negotiate or bargain in good faith with the Plainitffs about the seniority, employment and other rights of the employees represented by the Plaintiffs."

This question was heard on the pleadings and affidavits by the district court which, on February 3, with a comprehensive opinion, denied relief. F.Supp. . The union appealed, unsuccessfully sought interim relief ,and now argues the merits of its appeal.

The district court rested its decision upon a finding that the right of NE's management to decide the company's future outweighed whatever interest plaintiff had in protecting its members. It left unclear to what extent it was relying on particular facts to justify a finding that it would be inequitable to grant the injunction, and to what extent on a broader conclusion that because of the general interests of management and labor the statutory duty did not require bargaining. While we agree that it is appropriate, especially when both parties face irreparable injury, to weigh the com-

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[3] In point of fact, as will be evident, there is little to choose between the two, so far as consequences are concerned.

peting interests, we find it useful to speak in terms of the traditional tests of irreparable injury and probability of success on the merits. *See Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 1 Cir., 1968, 390 F.2d 113, 115-16, *cert. denied* 391 U.S. 914. In reviewing the district court's opinion, therefore, we shall first examine what we interpret as its finding that the balance of hardship favors denying relief, deferring for the moment the question of whether such relief must be granted nevertheless because an overwhelming case in plaintiff's favor is present on the merits and the equities of the case. *See Dorfmann* v. *Boozer*, D.C.Cir., 1969, 414 F.2d 1168, 1173.

The district court regarded with seriousness, as do we, the possible plight of the Union's membership if their employer is taken over and merged into another whose employees outnumber them twenty to one, which might well discontinue certain NE services, either absolutely, or as duplicative, and which does not, according to the Union, promise certain seniority and other rights that would accrue to its members had NE continued its operations. However, a court of equity must be concerned not only with possible injury to the plaintiff but also with whether an injunction would cause irreparable harm to the defendant, for it is obliged to choose the course likely to cause the least injury. *See Eutectic Welding Alloys Corp.* v. *Zeisel*, D.N.J., 1950, 11 F.R.D. 78, noted in Developments in the Law—Injunctions, 78 Harv.L.Rev. 994, 1056-59 (1965). It would be unrealistic not to view the possible ramifications of an injunction, the most obvious of which is the possible collapse of the merger, and the consequence, which on the record seem inevitable, of the demise of the company.[4] As against this, the consequences to the employees of the merger's accomplishment in accordance with

[4] The parties did not develop with us what benefits the employees would receive from a defunct and bankrupt company.

the present plan do not appear drastic. Extensive labor protective provisions are contained in the order proposed by the CAB examiner. Delta further assumes NE's obligations, which on their face include the obligation imposed by Article 3(B), ante. We cannot at this time measure the cloud that may be cast upon this obligation by the case of *William J. Burns Int'l Detective Agency, Inc.* v. *NLRB*, 2 Cir., 1971, 441 F.2d 911, *cert. granted* 404 U.S. 822, except to say that presently a cloud is all it is.[5] In any event, the employees will fare far better if the merger goes through without the desired negotiations than will the company, not to mention the employees themselves,[6] if it does not go through at all.

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[5] In *Burns*, there may have been no clause in the collective bargaining agreement making it binding on successors and assigns. Several recent arbitration cases have held that where there is such a clause and the successor has notice of it, he is bound by the contract. *See, e.g., Wheeler Bros.*, 1963, 41 Lab. Arb. 844, 850; *Lake States Leasing Corp.*, 1966, 46 Lab. Arb. 935. See generally Shaw & Carter, Sales, Mergers & Union Contract Relations, 19 N.Y.U. 19th Annual Conf. on Labor 357, 373 (1967). In any event, the successor in *Burns* did not purchase his predecessor's company, but simply won a particular contract away from him and retained most of his employees to perform it. That is significantly different from a merger in which the law is generally that the surviving company is bound by the contracts of the one which disappears. *See* 15 Fletcher, Private Corporations (1961 rev. ed.) § 7121. In the present case Delta in the merger agreement expressly assumes the duties of NE.

Even if Delta is not bound by all the terms of the union contract, it may well be obligated by Article 3(B) to bargain with the union about the effects of the merger. The employees' rights under Article 3(B) could be said to vest at the time of the merger and to impose a duty on the employer which must be discharged even after the collective bargaining agreement expires. Under the rule of *John Wiley & Sons, Inc.* v. *Livingston*, 1964, 376 U.S. 543, such an obligation may bind a successor, at least to some extent. *But cf. NLRB* v. *McFarland*, 10 Cir., 1962, 306 F.2d 219.

[6] We do not believe, or even suspect, that the Union wants the merger to fail. Rather, our suspicion is that realizing how strongly other persons desire the merger, the Union feels it may have the leverage to obtain something additional for itself. We do not say that this is wrong. On the other hand, the Union is not possessed with fireside equities.

With these preliminaries we turn to consider the likelihood that an injunction would interfere with the merger. We note first that the Union's conduct has itself enhanced the danger. Its demand to negotiate did not take place until November 11, although the merger agreement was executed in May, and was known to be in the making for some time before then. In July the agreement had been presented to the Board examiner; the Union, we understood in oral argument, had presented its own views, and the examiner had filed a report recommending certain provisions for the protection of the merged employees. For the Union now to seek to negotiate is not only late in the game, but would, if productive from Union's standpoint to the extent of requiring changes in the terms of the merger agreement, require going back to the Board. The merger cannot go through unless the Board decides that its terms, including the provisions for the employees, are in the public interest. 49 U.S.C. § 1378. *See Kent* v. *CAB*, 2 Cir., 1953, 204 F.2d 263, *cert. denied* 346 U.S. 826. The likelihood of this producing difficulties is only too apparent. Since the *United-Capitol Merger Case*, 1961, 33 C.A.B. 306, 342-47, the Board has uniformly applied the same labor protective provisions in every merger and route transfer case. *See American Airlines* v. *C.A.B.*, 2 Cir., 1971, 445 F.2d 891, *cert. denied* 40 U.S.L.W. 3315. These provisions are what the examiner has recommended in the present case, and are what the International Union candidly concedes it is seeking to attack as a matter of policy. Hence the Union's success at the bargaining table would presage probable opposition at the Board level, as well as possible rejection of the merger by Delta either because of the unwillingness of its shareholders to approve the merger on such more restrictive terms, or on the grounds that the terms exceeded "reasonable labor protective provisions of the character and extent previously prescribed" by the Board. Article 5 of Agree-

ment of Merger. Even if both Delta and the CAB approved the changes, the delay would itself be likely to destroy the merger, since the merger agreement expires June 30.

Since, as the district court properly found, an injunction, even to require NE to negotiate, let alone to postpone the merger, threatens damages to NE all out of proportion to those faced by the Union, we must place upon the Union the burden of showing a compelling probability of success on the merits.

The first of the Union's contentions is that Article 3(B) is itself an agreement to conduct premerger negotiations. Insofar as the court's denial of the injunction was based upon a rejection of that interpretation, we believe the court exceeded its jurisdiction. The Railway Labor Act provides specific procedures for the settlement of disputes. Disputes concerning matters about which the parties have a statutory duty to bargain under 45 U.S.C. § 152 First are denominated major disputes and are left to the statutory collective bargaining procedures for settlement. Disputes requiring the interpretation of the terms of a collective bargaining agreement are minor disputes. *See Elgin, J. & E. Ry.* v. *Burley,* 1945, 325 U.S. 711, 722-28. The Act provides that such disputes may be submitted by either party for settlement by a System Board of Adjustment and that the award of the Board is not subject to judicial review. 45 U.S.C. § 184. Because this section vests exclusive jurisdiction in the System Boards of Adjustment, the courts do not have jurisdiction to interpret the terms of a collective bargaining agreement. *Ruby* v. *Pan American World Airways,* S.D. N.Y., 1965, 252 F.Supp. 873, 880, *appeal dismissed,* 2 Cir., 1966, 360 F.2d 691; *Transport Workers Union* v. *American Airlines,* 10 Cir., 1969, 413 F.2d 746.

The courts have no greater power to interpret a contract when the dispute is between a union and an employer than when it is between an individual employee and the company.

*See Slocum* v. *Delaware, L. & W. R.R.*, 1950, 339 U.S. 239. Nor does it make a difference that here the clause in question arguably imposed a duty to bargain. While courts traditionally define the scope of the statutory duty to bargain, the statute provides no rationale for holding that the Board's authority to interpret a clause committing additional items to bargaining or regulating the procedures for bargaining is less than its general authority. The cases cited by the Union for the proposition that it is for the courts to decide to what settlement procedure the contract commits disputes, *e.g., Textile Workers Union* v. *Lincoln Mills,* 1957, 353 U.S. 448; *Steelworkers Trilogy,* 1960, 363 U.S. 564, were not decided in the context of the Railway Labor Act's express delegation of questions of contract interpretation to the System Boards and are therefore inapposite. The court's error was not inconsequential, for regardless of what interpretation the court would give to a contract clause, it may not on that ground refuse to enjoin a proposed change in working conditions until the Board has had an opportunity to rule whether the change is permitted by the contract.[7] *Cf. Rutland Ry.* v. *Brotherhood of Locomotive Eng'rs,* 2 Cir., 1962, 307 F.2d 21, *cert. denied* 372 U.S. 954.

Nevertheless, we affirm the district court's holding that an

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[7] Although it has long been held that strikes could be enjoined pending resolution of contract disputes by the Adjustment Board, *see Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R.R.*, 1957, 353 U.S. 30, there has been doubt whether an injunction could be issued temporarily barring changes in working conditions. *See generally* Comment, Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes, 60 Colum.L.Rev. 381, 386-97 (1960). We believe, however, that the same policies which led the Supreme Court to hold that a court may condition an anti-strike injunction on maintenance of the status quo, *Brotherhood of Locomotive Eng'rs* v. *Missouri - K. - T. R.R.*, 1960, 363 U.S. 528, 534, may also require that a union be able to enjoin changes in working conditions if it would be impossible otherwise later to make the workers whole. *See Local Lodge 2144* v. *REA*, 2 Cir., 1969, 409 F.2d 312; *Westchester Lodge 2186* v. *REA*, 2 Cir., 1964, 329 F.2d 748.

injunction should not issue on the basis of Article 3(B). The Union has not placed the matter before the System Adjustment Board. Since the purpose of an injunction is to preserve the jurisdiction of the Board, this is an inappropriate case to grant such relief.[8] *Westchester Lodge 2186* v. *REA*, ante n. 7, at 753; *Hiibert* v. *Pennsylvania R.R.*, 7 Cir., 1961, 290 F.2d 881, *cert. denied* 368 U.S. 900; *cf. Manion* v. *Kansas City Terminal Ry.*, 1957, 353 U.S. 927. *See also* 29 U.S.C. § 108.

Alternatively, the Union contends that section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, imposes on NE a statutory duty to negotiate with it about the protection to be accorded employees in the event the merger takes place. At the outset, NE argues that the federal courts are without jurisdiction to grant the relief asked in this case because the Union has refused to submit the dispute to the National Mediation Board and because section 5 First of the Railway Labor Act, 45 U.S.C. § 155 First, gives the Board jurisdiction over any such major dispute "not adjusted in conference between the parties or where conferences are refused." We disagree. There can be no doubt as to the court's power generally, when one party refuses to bargain on the ground that it has no duty to do so, to order such bargaining and, if necessary, to enjoin any change in working conditions pending completion of the negotiations. 45 U.S.C. § 156; *Virginian Ry.* v. *System Federation No. 40*, 1937, 300 U.S. 515; *cf. Chicago & N.W. Ry.* v. *United Transportation Union*, 1971, 402 U.S. 570. Judicial relief is not barred in this case by the Union's failure to exhaust administrative channels. The mediation procedures provided for major disputes are designed merely to bring the parties into agreement; they cannot perform the adjudicative function of de-

[8] There is no occasion for us to pursue some quite different arguments that occur to us that might militate against an injunction if the matter *were* before the Board.

ciding whether a party has a legal duty to bargain about a particular subject. *See Pan American World Airways* v. *International Bhd. of Teamsters,* ante.

NE suggests further that since the Union has raised a minor dispute as to whether the collective bargaining agreement requires negotiations about the merger, it cannot simultaneously take the position that there is also a major dispute arising from the merger because, regardless of the contract, there is a statutory duty to bargain. *Cf. Rutland Ry.* v. *Brotherhood of Locomotive Eng'rs,* ante. We might agree if the clause were one, as in *Rutland Railway,* that could arguably be construed as a clear waiver of a statutory right to bargain, but we find no merit in the company's position when the contract may, instead, impose an additional bargaining obligation, and certainly could not be read as an intentional relinquishment of any statutory rights.

We turn, then, to the merits of the statutory argument. Though it does not ask to participate in the decision whether to merge, the Union urges that the court's holding that it cannot bargain about the effects of the merger rests on the faulty premise that the merger itself is non-negotiable. In making this argument, it relies on *Fibreboard Paper Products Corp.* v. *NLRB,* 1964, 379 U.S. 203, in which the Court held that at least some managerial decisions (in that case, subcontracting) may be the subject of mandatory collective bargaining. The Union, however, reads *Fibreboard* too broadly. There the company's decision to contract out maintenance work previously done by its own employees did not alter its basic operations: the work was still to be performed in the same plant; no capital investment was contemplated; the independent contractor was to do the same work as the present employees under similar conditions of employment. Courts have consistently refused to extend the duty to bargain recognized in *Fibreboard* to analogous management decisions which are more central to manage-

ment's autonomous control over the direction of the business' operations.[9]

There are a number of reasons why we believe *Fibreboard* should not be extended to guarantee a union participation in a decision to merge. A merger is initially only a change in the ownership of the company. The impact of such a decision on jobs is not nearly so direct or immediate as the decision to subcontract work. While the change may eventually affect job security, such an effect is not an inevitable one, and could be bargained about separately from the merger itself. *Compare* Note, Automation and Collective Bargaining, 84 Harv.L.Rev. 1822, 1839 (1971). More basically, the decision to merge is much nearer the core of entrepreneurial control. It is the type of decision which Mr. Justice Stewart distinguished in *Fibreboard,* 379 U.S. at 223:

> "Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. . . . [T]hose management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area [subject to collective bargaining]."

*See, e.g., NLRB* v. *Drapery Mfg. Co.,* ante n. 9; *NLRB* v. *Royal Plating & Polishing Co.,* ante n. 9; *NLRB* v. *Transmarine Navigation Corp.,* 9 Cir., 1967, 380 F.2d 933; *General*

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[9] *See Textile Workers Union* v. *Darlington Mfg. Co.,* 1965, 380 U.S. 263 (termination of entire business); *NLRB* v. *Acme Industrial Products, Inc.,* 6 Cir., 1971, 439 F.2d 40 (relocation); *Morrison Cafeterias Consol., Inc.* v. *NLRB,* 8 Cir., 1970, 431 F.2d 254 (decision to shut down part of a business); *NLRB* v. *Drapery Mfg. Co.,* 8 Cir., 1970, 425 F.2d 1026; *NLRB* v. *Royal Plating & Polishing Co.,* 3 Cir., 1965, 350 F.2d 191; *NLRB* v. *Rapid Bindery, Inc.,* 2 Cir., 1961, 293 F.2d 170.

*Motors Corp.*, 191 N.L.R.B. No. 149, 1971 CCH NLRB ¶ 23,264.

To require an employer to include the union, in some cases possibly many unions, in discussions concerning a possible sale of the business would infringe greatly upon his control over his investment. Moreover, the nature of the decision itself makes it excessively burdensome to bring the union into the decision-making process. *See General Motors Corp.*, ante. Unlike a proposed subcontract, merger negotiations require a secrecy, flexibility and quickness antithetical to collective bargaining. Nor are the employees in a position to judge the complex financial considerations often involved. The economic necessity for a merger cannot be eliminated by bargaining in the same way as could Fibreboard's need to subcontract its maintenance work. We find no error in the district court's conclusion that the NE merger need not be made the subject of collective bargaining. *See NLRB* v. *Transmarine Navigation Co.*, ante; *Pennsylvania R.R.* v. *Transport Workers Union*, E.D.Pa., 1962, 202 F.Supp. 134; *General Motors Corp.*, ante.

This, however, does not end the matter, for the Union asks to bargain about the impact of the merger on employment conditions rather than about the merger itself. Initially, it can be agreed that employment security falls within the ambit of "rates of pay, rules and working conditions," 45 U.S.C. § 152 First; *see Walker* v. *Pennsylvania-Reading Shore Lines*, 1948, 142 N.J. Eq. 588, 61 A.2d 453, and that employers have an obligation generally to bargain about seniority, severance pay, and other matters relating to employment security. *E.g. NLRB* v. *Frontier Homes Corp.*, 8 Cir., 1967, 371 F.2d 974. It is equally clear that a company must give prior notice to the employees' representatives of any managerial decision which will have an impact on employment security and conditions so that the union will have an opportunity before the change takes place to negotiate

concerning how the employees are to be protected.[10] For example, when a company decides to relocate, although it cannot be required to bargain about whether and where to move, it can be forced to negotiate such matters as whether present employees will be given a right of first refusal, whether they will be paid for relocation expenses if they follow the company, and what economic relief they will be given if they do not. *See, e.g., NLRB* v. *Die Supply Corp.*, 1 Cir., 1968, 393 F.2d 462, 467.[11] We must decide whether in light of these general principles the district court committed a clear error of law in refusing the order requested by plaintiffs.

While a merger, too, affects employment security, it does so in a manner somewhat different from that of these other shifts in the corporate enterprise. A merger, unlike a decision to relocate, to shut down a plant, or to terminate operations altogether, does not immediately and directly eliminate jobs. What it does, instead, is substitute a new employer who may not be bound by all the terms of the present collective bargaining agreement,[12] and who may make further management decisions, such as integrating the operations of the two companies, which will eliminate jobs. A merger is different, also, in the nature of the decision itself. The other entrepreneurial changes we have discussed are characteristically unilateral, and affect only one firm. A merger, on the other hand, is the result of the decisions of two or more

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[10] In the case at bar there is no allegation that the notice given the Union of the merger was insufficient.

[11] *See also Morrison Cafeterias Consol., Inc.* v. *NLRB*, ante n. 9 (partial closing); *NLRB* v. *Drapery Mfg. Co.*, ante n. 9 (complete closing.

[12] See note 5, ante. The danger that a successor employer will not be bound by the specific terms of a collective bargaining agreement one of its constituent corporations had with its employees depends in part on whether the successor integrates the operations of the constituent firms, *see McGuire* v. *Humble Oil & Refining Co.*, 2 Cir., 1966, 355 F.2d 352, *cert. denied* 384 U.S. 988, and therefore is itself the function of management decisions yet to be made.

[illegible] negotiation between the company [illegible] affect the employees until the business of all the firm joined.

Where distinction [illegible] inappropriate to impose on a company about to be acquired by another in a merger an unlimited duty to bargain about the effects of the acquisition on employment security. Since the merger itself is not the proximate cause of job displacement, which will occur only as a result of management decisions subsequently made by the surviving company, any negotiations between the company being absorbed, in this case NE, and its union about what protection the employees should have against such displacement would be recklessly speculative, unless that company has knowledge of and control over the acquirer's plans. *See Martin Marietta Corp.*, 159 N.L.R.B. No. 59, 1966 CCH NLRB ¶ 20,559; *cf. NLRB* v. *Transmarine Navigation Corp.*, ante. The only way NE could regulate the postmerger management decisions of Delta would be to renegotiate the merger. Even were the bargaining to focus entirely on the impact of the merger itself on employment security, renegotiation of the merger would be the likely result. Ignoring the matter of the delay pending bargaining, see ante, renegotiation might be necessary if Delta balked at any highly restrictive employment security terms NE might be forced to agree to.[13] In any event, renegotiation is the only means by which NE could assure its employees that whatever conditions it agreed to would bind Delta.[14] Indeed, the Union's request that the court "issue a judgment directing Northeast . . . to incorporate the results of the . . . bargaining in any final merger agreement with Delta" suggests that renegotiation of the merger is precisely what the Union ultimately seeks.

We do not share the Union's equanimity at this prospect.

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[13] See page 7, ante.

[14] See notes 5 and 12, ante.

To allow the Union to force a company to bargain about the effects of its management decisions to the extent of forcing it to forego the proposed change in operations would be in effect to take away from it the freedom to make the decision in the first place. We have no doubt but that an employer, bargaining about the effect of a relocation on employment conditions, could refuse to discuss as unreasonable any labor protective terms that would make it prohibitively expensive to move. *See generally* Cox, The Duty to Bargain in Good Faith, 71 Harv.L.Rev. 1401, 1416 (1958). Where it is clear, as in the case of a merger, that bargaining about some effects of the decision would be ineffectual unless the company could be required to renegotiate the merger, we believe that the duty to bargain about those effects does not arise at all. Possibly were the need for negotiation compelling, we would feel differently, but in this case where Delta's employees, who would have no opportunity to participate, could be injured by whatever benefits NE's employees secure in premerger negotiations with their own employer, need points both ways.

Our discussion of the duty to bargain about the effects of a merger on employment conditions has so far been general. We have deferred until now the question of whether the regulation of the airline industry by the Civil Aeronautics Board in any way alters the scope of the duty. As we have pointed out, the Civil Aeronautics Act permits only those airline mergers which are found by the CAB to be not inconsistent with the public interest. 49 U.S.C. § 1378. The Board, in executing its responsibility, may condition approval of the merger on certain changes in and integration of the operations of the combining airlines. While this strengthens the proximity between the merger and its employment effects, that alone does not require that we expand the scope of bargaining to include postmerger working con-

ditions. The effects of the NE-Delta merger still depend on changes the nature of which are not at present known, because the CAB has not yet issued its order. Indeed, since the merger cannot proceed without CAB approval, requiring NE to bargain over its effects in this case would be even more likely to deprive NE of control over the decision to merge than it would an unregulated company. In an unregulated industry, if highly restrictive labor protective provisions in a collective bargaining agreement make unfeasible certain planned postmerger operating changes, the acquiring corporation may still be willing to proceed with the acquisition, foregoing the originally planned changes. This option is not available in an airline merger where the parties may not subsequently decide not to make changes on the proposals of which the CAB may have relied in approving the merger. In such circumstances, the bargaining might either be ineffectual, if the Board order displaces the collective bargaining agreement even to this extent, *cf. Kent* v. *CAB*, ante, or might interfere with the decision to merge. This latter effect, in addition to being contrary to our conclusion that an employer generally may not be required to bargain about the merger itself, would be inconsistent with the design of the economic regulation of the airline industry. The Civil Aeronautics Act authorizes the CAB to condition approval of airline mergers on the acceptance by the parties of labor protective provisions designed to protect the employees of the merged airlines from any adverse impact the merger may have on conditions of employment, *see Kent* v. *CAB*, ante at 265, and also to establish machinery for the peaceful settlement of any labor-management disputes arising out of the merger. *See American Airlines, Inc.* v. *CAB*, ante. One of the policies behind this grant of authority to the CAB is to prevent mergers adjudged by the Board to be in the public interest from

being obstructed by labor disputes.[15] Because of the danger of such obstruction, courts have held that the procedures of the Railway Labor Act are not available for disputes arising out of a merger which pertain to subjects covered by the Board's labor protective order, and should therefore, instead, be resolved by the procedures set forth in that order, even though the parties have, in private collective bargaining contracts, agreed to terms inconsistent with the order. *See Kent* v. *CAB*, ante; *American Airlines, Inc.* v. *CAB*, ante; *cf. Nemitz* v. *Norfolk & W. Ry.*, 6 Cir., 1971, 436 F.2d 841, 845-48, *aff'd*, 404 U.S. 37, 44. We believe, likewise, that the duty to bargain, even about terms which would supplement the CAB order,[16] must be limited in such a way as to assure that the negotiations will not jeopardize a merger approved by the CAB. Therefore, even matters which the company would otherwise have to negotiate under our interpretation of the Railway Labor Act, may be excluded from the negotiations if bargaining, with its corollary of a right to strike, would have the effect of somehow jeopardizing the merger.

We conclude, therefore, that NE cannot be required to bargain about the protection to be accorded its employees in the event of particular postmerger operating changes to be mandated by the CAB or to be made by Delta, nor about the employment rights of NE employees vis-a-vis Delta em-

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[15] While the legislative history of the Civil Aeronautics Act is silent on this point, the scheme of the economic regulation of the airline industry is borrowed in large part from the regulation of the rail industry by the Interstate Commerce Act. 49 U.S.C. §§ 1 *et seq.* The history of that Act does evidence a concern that labor disputes arising from rail consolidations be subject to authoritative resolution in order that economically desirable mergers not be obstructed. *See Brotherhood of Locomotive Eng'rs* v. *Chicago & N.W. Ry.*, 8 Cir., 1963, 314 F.2d 424, *cert. denied* 375 U.S. 819; *Railway Labor Exec. Ass'n* v. *United States*, 1950, 339 U.S. 142, 150-54.

[16] A private agreement supplementing the Board's order may be enforceable, *see Arnold* v. *Louisville & N. R.R.*, M.D.Tenn., 1960, 180 F.Supp. 429, *aff'd sub nom. Batts* v. *Louisville & N. R.R.*, 6 Cir., 1963, 316 F.2d 22, even though one inconsistent with the order is not. *See Kent* v. *CAB*, ante; *Nemitz* v. *Norfolk & W. Ry.*, ante.

ployees.[17] The Union having asked below, and argued here, for an all-or-nothing order, we do not feel called upon to consider what, if any, incidental matters it might be appropriate to bargain about,[18] except to say that even as to such matters, NE may, without violating its duty under 45 U.S.C. § 152 First to negotiate reasonably, refuse to incorporate any agreements reached into its merger agreement with Delta and may also refuse to discuss any terms which in its good faith opinion would force renegotiation of the merger or otherwise jeopardize its consummation.

Since NE had no obligation to bargain generally about the merger and its effects, the district court properly exercised its discretion not only in refusing to order NE to bargain, but also in declining to enjoin the merger pending completion of negotiations. There is no statutory command that the merger be enjoined. Section 6 of the Railway Labor Act, 45 U.S.C. § 156, barring any changes in working conditions during the course of bargaining, does not apply because, as we have already held, the merger itself is not a change in working conditions. Since an injunction, in part because of the Union's conduct, would be potentially disastrous, see ante, it would be inequitable to issue one simply to guarantee the Union an opportunity to bargain as to incidental matters.

*Affirmed.*

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[17] We express no opinion at this time as to whether Delta may be required to negotiate separately with NE workers about any of the changes when they occur. *See Overnite Transportation Co.* v. *NLRB*, 4 Cir., 1967, 372 F.2d 765, 768, *cert. denied* 389 U.S. 838; *cf. Mine Workers* v. *NLRB*, 7 Cir., 1963, 319 F.2d 428, *rev'd on other grounds* 375 U.S. 396; *NLRB* v. *McFarland*, ante.

[18] Although NE expressed some willingness to bargain about incidental matters, the Union, by refusing apparently to negotiate about anything until NE agreed to various demands, including, most strikingly, a consolidated seniority list comprehending the employees of both companies, which we have held to be outside the scope of any duty to bargain, made it impossible to know the extent of NE's willingness. We would be flying blind were we to try now to define the scope of the duty to negotiate incidental matters.

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 72-1038.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS ET AL.,
PLAINTIFFS, APPELLANTS,

*v.*

NORTHEAST AIRLINES, INC.,
DEFENDANT, APPELLEE.

## JUDGMENT

Entered April 20, 1972

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
*Clerk.*

Enter:
(s) ALDRICH, CH. J.

[cc: Messrs. Segal and Starrett.]

## APPENDIX C

### UNITED STATES DISTRICT COURT
### DISTRICT OF MASSACHUSETTS

Civil Action
No. 73-303-L.C.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
AND
DISTRICT 147 OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
PLAINTIFFS,
*v.*
NORTHEAST AIRLINES, INC.,
DEFENDANT.

### MEMORANDUM AND ORDER
February 3, 1972

CAMPBELL, D.J.

This case was heard on January 27, 1972 on an application for a temporary restraining order and a preliminary injunction. The issues were submitted on plaintiffs' verified complaint, affidavits from all parties, and briefs.

After consideration, and for reasons set forth below, the Court concludes that it must deny injunctive relief to the plaintiffs.

I

The plaintiffs, International Association of Machinists and Aerospace Workers (IAM) and District 147 of IAM, request a preliminary injunction (1) restraining the defendant, Northeast Airlines, Inc. (Northeast) from consummating any merger with Delta Air Lines, Inc. (Delta), until Northeast has negotiated with and bargained in good

faith with them about the "proper provisions for the protection of employees' seniority, employment and other rights", and (2) directing Northeast to negotiate with and bargain in good faith with them about the protection of employees' seniority, employment and other rights.

The relief ultimately sought by the plaintiffs in this action, in addition to the above injunctions, is "a judgment directing the defendant, Northeast Airlines, Inc., to incorporate the results of the negotiations and good faith bargaining with the plaintiffs in any final merger agreement with Delta Air Lines, Inc." (Prayer (4))

II

The plaintiffs cite the following Article III(B) of two collective bargaining agreements with Northeast, one dated April 18, 1969, covering employees in the mechanics' craft, and the other dated November 6, 1969,[1] covering supervisory employees:

> "It is further understood and agreed that all provisions of this Agreement shall be binding upon the successors or assigns of the Company [Northeast] for the duration of this Agreement. In case of a consolidation or merger, representatives of the Company and Union will meet without delay and negotiate for proper provisions for the protection of employees' seniority and other rights."

The plaintiffs also rely upon the provisions of 45 U.S.C. Sec. 152 First, reading as follows:

> ". . . It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to

[1] Northeast's collective bargaining agreement with the mechanics expired December 31, 1971, but its terms continue in effect under provisions of the Railway Labor Act (45 U.S.C. Sec. 156). That with the supervisory employees continues by its terms until at least June 1, 1972.

settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

III

For purposes of the matter now before me, the most relevant facts appear to be as follows:

On May 12, 1971, Northeast and Delta, pursuant to resolutions of their boards of directors, entered into a formal merger agreement, a copy of which is before the Court. Northeast's decision to merge was an outgrowth of what it represents to be its desperate financial plight (detailed in an exhibit to the Peterson affidavit). Northeast on May 31, 1971 had a negative net worth of $36,616,000. It is undisputed that Northeast, a small, mainly regional carrier, is, and has for some years been, in acute financial distress. There is nothing before me to contradict Northeast's assertions that the merger is essential to its survival.

The merger agreement provides that the two corporations shall be combined by merging Northeast into Delta. After the merger, the surviving corporation, Delta, is to be governed by a board of directors consisting of Delta's board on the date of the merger plus two named individuals. The share-holders of Northeast will receive fractional shares of Delta's stock. Delta is larger than Northeast. Northeast will, in effect, be absorbed into Delta. Northeast's employees represented by IAM number about 1,000. Delta has 20, 786 employees, none of whom, with the exception of the pilots, are members of a union.

The merger agreement provides that the merger will become effective upon filing and recording of the agreement in Delaware. This is to occur as soon as practicable after approval of the merger by the stockholders of the two corporations and by the C.A.B. under sections 408

and 801 of the Federal Aviation Act of 1958.* (A meeting of the stockholders of Northeast was scheduled for January 31, 1972, at which time the question of approval of the merger agreement was scheduled to be acted upon.) The agreement terminates if the merger is not approved by the C.A.B., by the latest, June 30, 1972. (See par. 15, (a)(3).)

The merger agreement contains provisions imposing liability upon Delta, after the merger, for all of Northeast's obligations, liabilities and duties, and transferring to Delta all of Northeast's rights and property.

The agreement also contains a clause entitled "Labor Protective Conditions". This provides that the surviving corporation will accept "reasonable labor protective provisions of the character and extent previously prescribed by the Civil Aeronautics Board". The Civil Aeronautics Board's trial examiner has written extensive labor protective provisions (Peterson affidavit, exhibit 7), which, according to the defendant (memorandum, p. 11), will be incorporated into any final Civil Aeronautics Board order approving merger. The merger agreement further provides that after the date of the merger, Delta will retain as its employees such employees of Northeast as is consistent with economic and efficient performance of the expanded operations of Delta, and will endeavor to provide continuing employment for them with Delta. Group insurance and retirement benefits for former Northeast employees are to be determined pursuant to existing Northeast plans.

It was asserted by counsel for Northeast, and not disputed, that the proposed merger was common knowledge prior to the execution of the May 12, 1971 agreement, and that the making of the agreement itself was also commonly known immediately thereafter.

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* 49 U.S.C. Secs. 1378, 1461

It is asserted by Northeast (Peterson affidavit) that in 1945, 1950, 1960 and 1964, mergers of Northeast with other airlines were negotiated or agreed to, although never consummated. In November 1969, Northeast entered into a merger agreement with Northwest Airlines, Inc. That agreement, although approved by the C.A.B., was terminated by Northwest early in 1971. Mr. Peterson asserts in his affidavit that the plaintiffs never demanded negotiations in connection with any of the above proposed mergers, even though Article III(B) has been in every contract with them since April 1, 1949.

On October 28, 1971, the company sent the union a so-called "Sec. 6 Notice" (notice pursuant to Section 6, Title I of the Railway Labor Act, as amended; 45 U.S.C. Sec. 156) stating its intention to propose a change in the existing mechanics agreement, which would extend the agreement "for a period of a few months". (Exhibit 2A of the verified complaint.) On October 31, 1971, the union, pursuant to Sec. 6, notified the company of its proposed changes. (Exhibit 2B of the verified complaint. In neither letter was there mention of the Northeast-Delta merger; however, among the union's proposed changes in the agreement was an expansion of Article III(B) to set forth procedures for negotiations before any merger should occur. (Orlando affidavit, exhibit 2C.)

Negotiations on a new contract opened on November 11, 1971, at which time the union representative, William J. Sutherland, asked for immediate negotiations, pursuant to Article III(B) of the existing agreement, for post-merger protective provisions for Northeast employees. (Complaint, exhibit 4.) The Northeast representative, Herbert E. Orlando, replied that he was uncertain whether or not his company was "prepared to negotiate" and would consult with Northeast's officers. (Orlando affidavit, p. 3.) According to Sutherland, Northeast on November 22, 1971

again refused to answer his request for negotiations, saying Delta would be consulted. Northeast maintains that in all encounters subsequent to the November 11 meeting, it has told the union that, though not obligated under Article III(B) to negotiate prior to merger, "it would be willing to discuss all such issues". (Orlando affidavit, p. 3.) On December 17, 1971, responding to Sutherland's letter of December 2 demanding negotiations (Complaint, exhibit 4.), Orlando stated: ". . . we are prepared in the future, as we have on several days in the past, to discuss fully the issues referred to in your letter as well as other matters about which we are bargaining." (Sutherland affidavit, exhibit 2.) Presumably such issues were those arising under Article III(B). However, the company has always maintained that it was not obligated to bargain over any terms of employment under Delta and Orlando says that he has "stated candidly that [he does] not see how an agreement on post-merger conditions can be reached prior to the approval and consummation of the merger". (Orlando affidavit, p. 3.) According to Sutherland, on the other hand, the company consistently refused to negotiate protective provisions up to and including the last meeting of the parties on December 21, 1971. (Sutherland affidavit, p. 3.) At that meeting the union broke off further negotiations over proposed changes in the collective bargaining contract. (Orlando affidavit, p. 4.)

On December 28, 1971, Northeast filed an application before the National Mediation Board, requesting mediation of the dispute over pre-merger negotiations (as well as mediation of the dispute over the union's proposed changes in the contract). (Orlando affidavit, exhibit 6.) The union, having sought the services neither of the Mediation Board nor of the System Board of Adjustment, filed this action here on January 24, 1972.

## IV

Turning from the facts to the substantive issues, I believe that, in the final analysis, my decision must rest upon a balancing of the plaintiffs' interest in protecting its members by bargaining to the fullest extent, against the right of Northeast's management to decide the future of that financially ailing airline.

If the union receives the injunctive relief requested, the merger (which was agreed to between Delta and Northeast in a binding contract six months before the union adopted its present posture) will be postponed and may even be aborted. If, on the other hand, no relief is granted, the merger may shortly occur — not, as hereafter indicated, with necessarily worse consequences to the employees, but at least without their having been able to attempt to influence the express terms of the merger agreement itself.

At this moment in time, under the particular facts and circumstances, I conclude that Northeast's right to proceed, unhampered, with the merger should prevail. I reach this result without in any way belittling the union's concern over the consequences to its members of the merger. The merger and its consequence are of obvious importance and seriousness to the employees of Northeast.

In stating that the primary issue involves a determination of competing interests, I do not suggest that there are not other issues. Some, such as the late timing of the union's demands and the lack of a clear showing by the union of irreparable harm, are intimately related to the weighing of competing equities. Others, such as the question of exhaustion of remedies under the bargaining contracts and under the Railway Labor Act, raise independent issues which might constitute alternative grounds for decision but which I do not believe need be reached.

V

It is crucial to have in mind the precise injunctive relief sought and the ultimate object, asserted in the complaint, of this litigation.

The plaintiffs argue that their aim is merely to cause Northeast to engage in good faith bargaining over post-merger seniority and employment — that their request is merely, as it were, to reopen lines of communication with Northeast. By themselves, these are reasonable enough demands.[2] However, the relief sought to accumplish these results is rather less innocuous.

The plaintiffs seek an injunction enjoining "Northeast from consummating any merger" with Delta (pursuant to its outstanding contract) until it has bargained and negotiated with the plaintiffs in good faith about the proper provisions for protection of employees' seniority, employment and other rights. Further, the complaint makes clear that the aim of the bargaining is not the usual one of a new collective bargaining agreement between the union and Northeast. Rather the Court is ultimately to "issue a judgment directing . . . Northeast . . . to incorporate the results of the . . . bargaining in any final merger agreement with Delta". This judgment is to issue although Delta is not a party to this proceeding.

Since Delta cannot be required to agree to a change in the terms of the present contract, and since Delta, the larger and stronger of the two airlines, might well be expected to decline such a change in terms, the ultimate relief

[2] It is to be noted that the union, not Northeast, broke off negotiations in late December. The union thereafter rejected the company's request for mediation by the National Mediation Board and has refused to invoke the so-called "minor dispute" procedures in the bargaining contracts and in the Railway Labor Act. Northeast asserted in Mr. Orlando's letter of December, 1971 that it was fully prepared to discuss all the issues. However, Orlando also told the union that he did not see how an agreement on post-merger conditions could be reached prior to approval and consummation of the merger.

requested might have the effect of aborting the merger. Indeed, even an injunction postponing the merger indefinitely could have that effect, since Delta is not required to waive timely performance by Northeast.

Thus the plaintiffs seek far more than an order reopening channels of negotiation. To secure what they assert to be their bargaining rights, they demand that the Court subordinate Northeast's rights under the merger agreement and imperil the merger itself.

VI

The plaintiffs rest their claims for relief upon 45 U.S.C. §152 First and upon Article III(B) of the collective bargaining contracts. (Both the statute and contract provision are quoted above.)

Section 152 First requires carriers to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes." This language requires carriers to bargain and negotiate in good faith. Nonetheless, the duty to exert every reasonable effort to make and maintain agreements does not, I believe, go so far as to require a carrier to postpone, renegotiate and jeopardize its rights under a pre-existing merger agreement upon the insistence of its employees.

The decision to merge, like the decision of an enterprise to invest in labor-saving machinery or to liquidate, is a managerial decision. See *Fiberboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 223 (1964) (concurring opinion of Justice Stewart, with Justices Harlan and Douglas).

The Court said in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 549 (1964):

> "Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the em-

ployees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations . . . ."

Management's position is strengthened in this case by the fact that the plaintiffs waited for six months after execution of the present merger agreement to demand negotiations. While the seniority, employment and other rights which they wish to bargain for are their legitimate concerns, the relief they now seek would have an impact far beyond the specific matters they wish to negotiate. Delta is, of course, under no obligation to postpone the merger or to accept a new merger agreement or to abandon its rights under the old one. If relief is granted, the management of Northeast would be deprived of a substantial measure of control over the decision to merge itself.

This is not to say that the plaintiffs may not bargain for a new collective bargaining contract which may have provisions relating to seniority and other matters surviving the merger. Under Article III(B), the existing collective bargaining contract is declared to be binding upon Northeast's successors and assigns. It, or a successor agreement, may well be enforceable after the merger. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964). Arbitrators have often held that, where the acquiring company is on notice of a successors and assigns clause, it is bound by the terms of the contract. *See*, e.g., *Wheeler Bros.*, 41 Lab. Arb. 844, 850 (1963), *Lake States Leasing Corp.*, 46 Lab. Arb. 935 (1966), *Sanborn's Motor Express, Inc.*, 44 Lab. Arb. 346 (1965).

It is true that the court in *Burns Int. Detective Agency* v. *NLRB*, 441 F.2d 911 (2nd Cir. 1971), held that a successor is not bound by all the terms of the pre-existing contract. But it appears that the contract may not have included a successors and assigns clause. The opposite result was, in any event, reached in *Ranch-Way, Inc.* v.

*NLRB*, 445 F.2d 665 (10th Cir. 1971). The Burns case is now before the Supreme Court.

Moreover, Northeast represents that the C.A.B., which must approve the merger, will, in its decision, afford employees protective provisions such as those set forth extensively in a report of the C.A.B. hearing examiner. (Defendant's Memorandum, p. 11, Peterson affidavit) *See* 49 U.S.C. §1378(b). The C.A.B., as part of its statutory authority to regulate the merger of air carriers, has extensive power to order the integration of employees. The C.A.B.'s rulings as to the placing of employees on seniority lists may even supersede the provisions of a collective bargaining agreement. *Kent* v. *Civil Aeronautics Bd.*, 204 F.2d 263 (2nd Cir. 1953), *cert. denied* 346 U.S. 826 (thus making it questionable whether and to what extent arrangements made at this time between Northeast and the plaintiffs would be useful or feasible).

In any event, I do not construe Northeast's reluctance, at this late hour, to place on the bargaining table items which would involve a renegotiation of the previously executed merger agreement with Delta as unreasonable or as in violation of the provisions of Section 152 First.

VII

The plaintiffs further rely upon Article III(B) of the two collective bargaining contracts now in effect.

The first sentence of the clause provides that the collective bargaining contract shall be binding upon the successors and assigns of Northeast. The second sentence states:

> "In case of a consolidation or merger, representatives of the company and union will meet without delay and negotiate for proper provisions for the protection of employees' seniority and other rights."

It is not clear (especially in context of the preceding sentence) whether this second sentence calls for negotiations

*after* a merger or before. Furthermore, there is nothing in the sentence or in the collective bargaining contracts themselves which binds the company not to merge on its own, rather than the union's, timetable. The contracts nowhere expressly condition a merger upon the holding of prior bargaining sessions. (The absence of such language may be contrasted with specific provisions in Article III(C) prohibiting strikes and lock-outs pending the attempts to settle disputes through established procedures).

If one assumes, notwithstanding the dispute and grievance procedures in the contract and in the Railway Labor Act, that this Court now has the authority to interpret this sentence, I would conclude that the language does not go so far as to give to the Union a mandatory voice in the negotiating of the merger. If the contract was intended to condition the right to merge upon satisfactory advance bargaining concerning the terms of the merger, one would expect it to have said so.

The failure of the union to request pre-merger negotiations in five previous instances of contemplated mergers, and the fact that it did not raise the present issue until six months after the Delta merger agreement was executed, is consistent with the foregoing interpretation.

One can argue, of course, that while the right to merge is not conditioned upon advance bargaining, the practical circumstances of this case justify an injunction as the only means of enforcing the union's contractual right to negotiate with the company concerning proper provisions for the protection of employees' rights. But given the accepted notion that merger is a management decision, the "ambiguity of the clause, the serious potential impact" of an injunction upon Northeast and its future existence, and the other equities and circumstances, I am unable to reach that result.

Northeast, of course, contends that the interpretation

of this clause, like the other contract provisions, is a matter for the System Board of Adjustment, as a so-called minor dispute. The union has not placed the matter before the Board, nor is it willing to accept mediation by the National Mediation Board. One may question whether the union, as a precondition to the injunctive relief sought, has made "every reasonable effort" to settle this dispute, using the procedures of the Railway Labor Act and the contracts. 29 U.S.C. §108.

The union contends that the dispute is not a minor one, and relies upon *Chicago & Northwestern Ry.* v. *United Transportation Union*, 402 U.S. 570 (1971). (In that case, the Court specifically noted that the parties had exhausted the formal procedures of the Railway Labor Act.)

Even assuming, without deciding, that the union is right, I do not interpret Article III(B), any more than I do 45 U.S.C. §152, as conferring upon the union, under the present circumstances, the right to the relief sought in this suit: namely, to enjoin the consummation of the Delta merger pending negotiations between Northeast and itself and a final "judgment directing the defendant, Northeast Airlines, Inc., to incorporate the results of the negotiations and good faith bargaining with the plaintiffs in any final merger agreement with Delta Air Lines, Inc." (Prayer (4))

VIII

Since even on the legal posture most favorable to the plaintiffs, I do not believe that the plaintiffs have a reasonable probability of success, I am of the opinion that a preliminary injunction may not issue.

I further conclude that the plaintiffs have failed to demonstrate that they and the employees they represent will suffer irreparable harm if the requested injunctive relief is denied. Even if Delta will not be bound by the existing or later negotiated collective bargaining agreements, and

even if the C.A.B. does not afford the employees adequate protection, it is by no means clear that bargaining with Northeast at this time can accomplish important lasting results. There is little assurance that Delta would accept more favorable labor provisions than it would later accept, or that Northeast would be in a position to require Delta to accept them. Northeast is the weaker of the two companies, and would seem to be in a poor position to force a renegotiation of the merger agreement. What could occur — to the ultimate likely detriment of all concerned, including the public — is the collapse of the merger and the possible eventual collapse of Northeast. As against the highly speculative gain to the employees of an injunction, one must weigh the more positive danger to Northeast's future existence should the merger be aborted.

Preliminary injunction denied.

*United States District Judge*